

AMENDMENT IN THE NATURE OF A SUBSTITUTE
TO H.R. 2102
OFFERED BY MR. BOUCHER OF VIRGINIA

Strike all after the enacting clause and insert the following:

1 SECTION 1. SHORT TITLE.

2 This Act may be cited as the “Free Flow of Informa-
3 tion Act of 2007”.

4 SEC. 2. COMPELLED DISCLOSURE FROM COVERED PER-
5 SONS.

6 (a) CONDITIONS FOR COMPELLED DISCLOSURE.—In
7 any matter arising under Federal law, a Federal entity
8 may not compel a covered person to provide testimony or
9 produce any document related to information obtained or
10 created by such covered person as part of engaging in
11 journalism, unless a court determines by a preponderance
12 of the evidence, after providing notice and an opportunity
13 to be heard to such covered person—

14 (1) that the party seeking to compel production
15 of such testimony or document has exhausted all
16 reasonable alternative sources (other than the cov-
17 ered person) of the testimony or document;

18 (2) that—

1 (A) in a criminal investigation or prosecu-
2 tion, based on information obtained from a per-
3 son other than the covered person—

4 (i) there are reasonable grounds to be-
5 lieve that a crime has occurred; and

6 (ii) the testimony or document sought
7 is critical to the investigation or prosecu-
8 tion or to the defense against the prosecu-
9 tion; or

10 (B) in a matter other than a criminal in-
11 vestigation or prosecution, based on information
12 obtained from a person other than the covered
13 person, the testimony or document sought is
14 critical to the successful completion of the mat-
15 ter;

16 (3) in the case that the testimony or document
17 sought could reveal the identity of a source of infor-
18 mation or include any information that could reason-
19 ably be expected to lead to the discovery of the iden-
20 tity of such a source, that—

21 (A) disclosure of the identity of such a
22 source is necessary to prevent an act of ter-
23 rorism against the United States or other sig-
24 nificant and specified harm to national security
25 with the objective to prevent such harm;

1 (B) disclosure of the identity of such a
2 source is necessary to prevent imminent death
3 or significant bodily harm with the objective to
4 prevent such death or harm, respectively; or

5 (C) disclosure of the identity of such a
6 source is necessary to identify a person who has
7 disclosed—

8 (i) a trade secret, actionable under
9 section 1831 or 1832 of title 18, United
10 States Code;

11 (ii) individually identifiable health in-
12 formation, as such term is defined in sec-
13 tion 1171(6) of the Social Security Act (42
14 U.S.C. 1320d(6)), actionable under Fed-
15 eral law; or

16 (iii) nonpublic personal information,
17 as such term is defined in section 509(4)
18 of the Gramm-Leach-Bliley Act (15 U.S.C.
19 6809(4)), of any consumer actionable
20 under Federal law; and

21 (4) that the public interest in compelling disclo-
22 sure of the information or document involved out-
23 weighs the public interest in gathering or dissemi-
24 nating news or information.

1 (b) LIMITATIONS ON CONTENT OF INFORMATION.—

2 The content of any testimony or document that is com-
3 pelled under subsection (a) shall—

4 (1) not be overbroad, unreasonable, or oppres-
5 sive and, as appropriate, be limited to the purpose
6 of verifying published information or describing any
7 surrounding circumstances relevant to the accuracy
8 of such published information; and

9 (2) be narrowly tailored in subject matter and
10 period of time covered so as to avoid compelling pro-
11 duction of peripheral, nonessential, or speculative in-
12 formation.

13 (c) RULE OF CONSTRUCTION.—Nothing in this Act
14 shall be construed as applying to civil defamation claims
15 or defenses under State law, regardless of whether or not
16 such claims or defenses, respectively, are raised in a State
17 or Federal court.

18 **SEC. 3. COMPELLED DISCLOSURE FROM COMMUNICATIONS**

19 **SERVICE PROVIDERS.**

20 (a) CONDITIONS FOR COMPELLED DISCLOSURE.—

21 With respect to testimony or any document consisting of
22 any record, information, or other communication that re-
23 lates to a business transaction between a communications
24 service provider and a covered person, section 2 shall apply
25 to such testimony or document if sought from the commu-

1 communications service provider in the same manner that such
2 section applies to any testimony or document sought from
3 a covered person.

4 (b) NOTICE AND OPPORTUNITY PROVIDED TO COV-
5 ERED PERSONS.—A court may compel the testimony or
6 disclosure of a document under this section only after the
7 party seeking such a document provides the covered per-
8 son who is a party to the business transaction described
9 in subsection (a)—

10 (1) notice of the subpoena or other compulsory
11 request for such testimony or disclosure from the
12 communications service provider not later than the
13 time at which such subpoena or request is issued to
14 the communications service provider; and

15 (2) an opportunity to be heard before the court
16 before the time at which the testimony or disclosure
17 is compelled.

18 (c) EXCEPTION TO NOTICE REQUIREMENT.—Notice
19 under subsection (b)(1) may be delayed only if the court
20 involved determines by clear and convincing evidence that
21 such notice would pose a substantial threat to the integrity
22 of a criminal investigation.

23 **SEC. 4. DEFINITIONS.**

24 In this Act:

1 (1) COMMUNICATIONS SERVICE PROVIDER.—

2 The term “communications service provider”—

3 (A) means any person that transmits infor-
4 mation of the customer’s choosing by electronic
5 means; and

6 (B) includes a telecommunications carrier,
7 an information service provider, an interactive
8 computer service provider, and an information
9 content provider (as such terms are defined in
10 sections 3 and 230 of the Communications Act
11 of 1934 (47 U.S.C. 153, 230)).

12 (2) COVERED PERSON.—The term “covered
13 person” means a person who, for financial gain or
14 livelihood, is engaged in journalism and includes a
15 supervisor, employer, parent, subsidiary, or affiliate
16 of such covered person. Such term shall not in-
17 clude—

18 (A) any person who is a foreign power or
19 an agent of a foreign power, as such terms are
20 defined in section 101 of the Foreign Intel-
21 ligence Surveillance Act of 1978 (50 U.S.C.
22 1801); or

23 (B) any organization designated by the
24 Secretary of State as a foreign terrorist organi-
25 zation in accordance with section 219 of the

1 Immigration and Nationality Act (8 U.S.C.
2 1189).

3 (3) DOCUMENT.—The term “document” means
4 writings, recordings, and photographs, as those
5 terms are defined by Federal Rule of Evidence 1001
6 (28 U.S.C. App.).

7 (4) FEDERAL ENTITY.—The term “Federal en-
8 tity” means an entity or employee of the judicial or
9 executive branch or an administrative agency of the
10 Federal Government with the power to issue a sub-
11 poena or issue other compulsory process.

12 (5) JOURNALISM.—The term “journalism”
13 means the gathering, preparing, collecting,
14 photographing, recording, writing, editing, reporting,
15 or publishing of news or information that concerns
16 local, national, or international events or other mat-
17 ters of public interest for dissemination to the pub-
18 lic.